

RSC Policy Brief: Nominal Drug Pricing and the “Stimulus”

The Planned Parenthood Earmark

September 2008

Likely sometime this week, the House may consider the Senate amendment to the Continuing Resolution, H.R. 2638, which the House passed on September 24, 2008 by a vote of [370-58](#). The Senate may include a provision in H.R. 2638 which would undo a provision in the Deficit Reduction Act of 2005 (DRA) that removed university clinics and private birth control clinics—including many Planned Parenthood clinics—from the list of entities entitled to receive “nominal” drug pricing under the Public Health Service Act of 1944.

Background on Nominal Drug Pricing

Drug companies affiliated with Medicaid are not allowed to charge the Medicaid program an amount in excess of their average price for the drug in the private sector. These prices are referred to as “best prices.” However, beginning in the early 1990’s there was an exception granted for sales to organizations at what is called a “nominal price”—a price below the “best price.” Sales categorized as nominal price sales were not included in the calculation of best prices, thereby allowing drug companies to charge Medicaid a higher price for drugs above the discounted rate that they were charging the exempted organizations.

Due to concerns about abuse of the system, changes were **intentionally** made in the DRA to limit the number of organizations that were able to receive this nominal drug price. Among the specific changes made—many of which were done to save the federal government money—the DRA limited the nominal drug pricing exclusion to the following entities:

- A covered entity described in section 340B(a)(4) of the Public Health Service Act (e.g. state-operated AIDS Drug Assistance Programs, Consolidated Health Centers, Health Care for the Homeless, etc);
- An intermediate care facility for the mentally retarded (ICF/MR),
- A state-owned or operated nursing facility, and any other facility or entity that the Secretary determines is a safety net provider to which sales of such drugs at a nominal price would be appropriate, based on certain factors such as type of facility or entity, services provided by the facility or entity, and patient population.

Previously, organizations who were considered “safety-net clinics” were receiving nominal drug prices. Safety-net clinics began to include Planned Parenthood clinics, as well as college and university health centers. The changes made in the DRA went into effect to ensure that only government supported entities would be receiving nominal drug pricing.

During the debate on the Iraq Supplemental in 2007, Democrat Members of the Appropriations Committee made it clear that their intent was to reverse this DRA provision and allow university health clinics and Planned Parenthood to receive such nominal drug pricing again, as they did before the changes in 2005. Language included in the supplemental extended the nominal pricing option to entities that do not receive federal funding for family planning. Furthermore, the Democratic provision would have allowed drug manufacturers to avoid counting the discounted drugs sold to certain types of clinics when calculating “best prices.” If successful in overturning the DRA provision, many clinics would receive manufacturer prices cheaper than what Medicaid receives, which they can turn around to sell at a higher price and make a profit.

According to report language written by the Democrat Committee staff, **this effort was targeted to ensure that Planned Parenthood** (and university clinics) **receive drugs at nominal prices.** In fact, they went so far as to include the following in the text of the Committee report;

The bill includes technical corrections to the Deficit Reduction Act (DRA) regarding Medicaid. These corrections: ... (5) **clarify current law that planned parenthood clinics and certain university clinics can continue to receive nominal drug prices** ...

The Senate may include this same language to overturn the DRA in H.R. 2638, the Continuing Resolution/Stimulus scheduled to be considered by the Senate this week.

Supporting Planned Parenthood

If the DRA provision on nominal drug pricing was overturned, it would provide preference for Planned Parenthood affiliates across the country. Planned Parenthood would be able to make considerable profits off of selling birth control—having received the contraceptives at a significantly discounted rate—all while underselling private pharmacies by large margins.

Many conservatives may be concerned that additional profits made by Planned Parenthood would only increase their ability to provide abortions, lobby for their anti-life causes, purchase advertising, etc.

Furthermore, nominal drug pricing would apply to more than just monthly contraceptives, extending to include the morning-after-pill (i.e. Plan B). Administration officials have also indicated that the abortifacient, RU-486, would fall under this rubric.

Other Conservative Concerns

Many of the organizations that this provision intends to open up nominal drug pricing to are **not** safety-net clinics—the type of clinic that nominal drug pricing was intended to address. Historically, safety-net clinics are heavily dependent on Medicaid funding. Specifically, university and college health centers do not serve excessively poor populations, but rather, often serve educated and affluent populations. Many conservatives may feel that the recipients at these clinics should not receive prices lower than those received by Medicaid.

Many conservatives may be concerned that in order to add exempted organizations, certain organizations must be expressly authorized—which would mean that Planned Parenthood would be explicitly added to the list of approved organizations. Last year, Planned Parenthood made **\$115 million in excess revenue**—thanks to \$337 million from taxpayers—and is currently lobbying for even more federal funding. Many conservatives may feel that such an organization should not be considered a safety-net clinic in need of nominal drug pricing. Furthermore, there is nothing in current law prohibiting Planned Parenthood—or any other clinic—from marking up a drug after it's purchased from the manufacturer at a nominal drug price. Adding Planned Parenthood to the list would only increase the opportunity for them to turn a profit off of the federal government.

Other Legislation

Both Senator Obama (D-IL) and Representative Crowley (D-NY) have introduced legislation to restore the discounts to Planned Parenthood. S. 2347 and H.R. 4054 would amend Medicaid guidelines to revise requirements for the best price component of the formula for determination of the Medicaid rebate, and would revise the list of entities to which sales by a manufacturer of covered drugs at nominal prices can be considered to be sales at a nominal price. Both bills would add to a list of entities, any entity that is operated by a health center of an institution of higher education, primarily for its students (university-based clinic); or a public or private nonprofit entity that provides family planning services under the Public Health Service Act (i.e. Planned Parenthood).

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